IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 1-2-2002

Coram

The Honourable Mr. JUSTICE P. THANGAVEL

Civil Revision Petition No.3892 of 2001 and C.M.P.No.20986 of 2001

K. Selvam. ...Petitioner
Vs.
1. Visalam Chit Fund Ltd.,
Srivilliputhur, ` represented by its Branch Manager.
$2. S. Selvaraj.
$3.Tmt. S. Kanagamalai.
$4.S. Veluchamy.
$5.Sethurajan. ...Respondents.

This Civil Revision Petition is filed under section 115 of Civil Procedure Code against the order and decretal order dated 12.11.2001 and made in E.A.No.478 of 2000 in E.P.No.257 of 1996 in O.S.No.203 of 1998 on the file of the Sub Court, Srivilliputhur.

! For petitioner : Mr. V. Sundararajan

^ For 5th respondent : Mr. K. Muthuramalingam.

: ORDER

This Civil Revision Petition has been filed by the petitioner as revision petitioner against the order and decretal order dated 12.11.2001 and made in E.A.No.478 of 2000 in E.P.No.257 of 1996 in O.S.No.203 of 1998 on the file of the learned Subordinate J udge, Srivilliputhur.

2. The facts that are necessary for disposal of the Civil Revision Petition are as follows:- The second respondent herein is the owner of the property described as fourth item in the execution petition in E.P.No.257 of 1996 and the said property was brought to sale in court

auction in execution of the decree obtained by one Lakshmi against the second respondent herein in O.S.No.72 of 1986 on the file of the Sub Court, Srivilliputhur for the amount due under a promissory note from the second responde t herein to the above said Lakshmi. The demised property was sold in Court auction in E.P.No.15 of 1989 in O.S.No.72 of 1986 on 4.2.1994 and the said property was purchased by one Tamilselvam admittedly for a sum of Rs.12,000/-. The sale was admittedly confirmed on 29.4.1994 and a sale certificate was issued in favour of Tamilselvam by the execution Court. The above Tamilselvam sold the demised property in favour of the revision petitioner by means of a registered sale deed dated 21.11.1994 for Rs.12, 51/- and from that day he has been in possession and enjoyment of the said property as absolute owner thereof. The fifth respondent is said to have purchased the demised property and other properties on 10.12.1999 in Court auction sale brought in execu ion of a mortgage decree in O.S.No.203 of 1988 on the file of the Sub Court, Srivilliputhur obtained against the second respondent by the first respondent. The revision petitioner was not a party to the suit in O.S.No.203 of 1988 or party to the executi n proceeding in E.P.No.257 of 1996 in O.S.No.203 of 1988 on the file of the Sub Court, Srivilliputhur. Pursuant to the sale certificate issued after confirmation of sale on 1.3.2000, the fifth respondent herein is taking steps through Court to take deli ery of possession of the demised property from the revision petitioner. It is under the said circumstances, the revision petitioner has filed the said execution application to declare that the sale of the demised property described in the execution appl cation in the Court auction on 10.12.1999 in E.P.No.257 of 1996 in O.S.No.203 of 1988 on the file of the Sub Court, Srivilliputhur and confirmation of sale on 1.3.2000 are not sustainable and will not confer any title in favour of the fifth respondent h rein.

3. The first respondent herein has resisted the claim made by the revision petitioner on the following grounds:- The first respondent herein is a registered chit fund company and the second respondent was a subscriber of chit of denomination of Rs.1, 50,000/-. The second respondent herein beat chit on eighth month and received the amount on 12.7.1984. after executing a promissory note. As security the second respondent deposited the title deeds of the property described in the execution application on 17.8.1984 and other properties. Thereafter a memorandum was also given by the second respondent in favour of the first respondent with regard to the deposit of title deeds as security on 17.8.1984 itself for the amount received on 12.7.1984. The sec nd respondent has failed to pay the amount due to the first respondent and therefore a suit for recovery of the amount due to the first respondent from the second respondent was filed in O.S.No.203 of 1988 and a preliminary decree was obtained on 27.4.19 3. A final decree was passed on 29.1.1996. The properties were brought to sale in Court auction in E.P.No.257 of 1996 in O.S.No.203 of 1988 on the file of the Sub Court, Srivilliputhur and the fifth respondent purchased the demised property and other roperties for Rs.43,300/-. The sale was confirmed in favour of the fifth respondent with regard to the demised

property and other properties on 1.3.2000 and sale certificate was also issued in his favour. The purchase of the demised property by Tamilse vam will be subject to the mortgage by deposit of title deeds in favour of the first respondent. The sale of the demised property by Tamilselvam to the revision petitioner will also be subject to the above said mortgage.

4. The fifth respondent herein while supporting the stand taken by the first respondent herein contends that he has purchased the demised property and other properties in the Court auction held on 10.12.1999 in E.P.No.257 of 1996 in O.S.No.203 of 1988 p ursuant to the final decree obtained in the above said suit on 29.1.1996 and sale certificate was issued after confirmation of sale with regard to the demised property and other properties in favour of the fifth respondent on 1.3.2000. Hence the fifth r spondent is entitled to recover possession of the demised property. The revision petitioner cannot claim that the fifth respondent is not entitled to recovery of possession from him or for the relief of declaration prayed for as mentioned above. Theref re, the respondents 1 and 5 herein sought for dismissal of the execution application filed by the revision petitioner.

5. After considering the material evidence available on record and after considering the submission made on both sides, the execution Court has come to the conclusion that the fifth respondent herein is entitled to recovery of possession of the demised property in view of the sale certificate issued by the competent Court, that the claim made by the revision petitioner that a declaration has to be issued that the sale in Court auction in favour of fifth respondent herein in E.P.No.257 of 1996 in O.S.N .203 of 1988 on 10.12.1999 and confirmation of sale on 1.3.2000 is not sustainable and that therefore the further claim that the fifth respondent has no right to the demised property can not be sustained. Accordingly the execution application filed by he revision petitioner was dismissed by the execution Court. Aggrieved at the order and decretal order dated 12.11.2001 and made in E.A.No.478 2000 in E.P.No.257 of 1996 in O.S.No.203 of 1988 on the file of the Sub Court, Srivilliputhur, the petitioner s revision petitioner has come forward with this Civil Revision Petition. 6. The point for determination is whether there are grounds to interfere with the order and decretal order passed by the Court below? 7. The revision petitioner was examined as P.W.1 while P.W.2 M. Sankar and P.W.3 Manikandan were examined to support that P.W.1 is in possession of the demised property. Exs. P-1 to P-10 were also produced before the Court. The Manager of the first resp ndent chit fund company, Vellaiyan was examined as R.W.1 while the fifth respondent Sethurajan was examined as R.W.2. Ex. R-1 was marked on the side of the respondents. 8. Admittedly the property described in the execution application by t he revision petitioner, who is a third party to the suit proceedings, belonged to the second respondent. The fact also remains that the second respondent was a subscriber in the chit of denomination of Rs.1,50,000/- run by the

first respondent, a regist red chit fund company and he beat the chit on the eighth month and received the amount on 12.12.1983 from the first respondent after executing a promissory note. Thereafter the second respondent had deposited the document of titles with regard to the roperty described in the execution application with the first respondent on 17.8.1984 followed by execution of a memorandum therefor. Therefore it is evident that the second respondent has created a mortgage by deposit of title deeds in favour of the f rst respondent with regard to the demised property with effect from 17.8.1984. As the second respondent has not paid the amount due to the first respondent, he filed a suit on mortgage by deposit of title deeds and obtained the preliminary decree on 27 4.1993 in O.S.No.203 of 1988 on the file of the Sub Court, Srivilliputhur and final decree was also passed on 29.1.1996 in the suit in O.S.No.203 of 1988. It is equally not in dispute that the second respondent herein had borrowed some money from one La shmi and executed a promissory note . The said Lakshmi filed a suit in O.S.No.72 of 1986 on the file of the Sub Court, Srivilliputhur against the second respondent and obtained a decree on 27.11.1986. In execution of the above said decree in E.P.No.15 of 1989 the demised property was brought to sale and the said property was sold for Rs.12,000/- in favour of one Tamilselvam in Court auction on 4.2.1994 which was long after passing of the preliminary decree on 27.4.1993 in O.S.No.203 of 1988 on the fil of the very same Court. The fact also remains that the sale was confirmed and sale certificate was issued in favour of Tamilselvam on 29.4.1994 as seen in Ex. P-2 dated 24.10.1994, registration copy of sale certificate. Tamilselvam, who had not taken elivery of the demised property through Court, had sold the demised property in favour of the revision petitioner on 21.11.1994 for Rs.12,151/-as seen in Ex. P-3. The revision petitioner who claims to be in possession of the demised property gets suppor from P.Ws.2 and 3 who are said to be in possession of the shops bearing door Nos.173 and 173-A respectively in the demised property. 9. Admittedly the demised property was brought to sale in E.P.No.257 of 1996 on the file of the Sub Court, Srivilliputhur in execution of the mortgage decree by deposit of title deeds and the fifth respondent, who is said to be a relative of the second respondent herein, had purchased the said property in Court auction on 10.12.1999. Admittedly the s le was confirmed in favour of the fifth respondent with regard to the demised property and other properties and a sale certificate was issued in his favour on 1.3.2000. It is when the fifth respondent has taken steps through execution Court to take del very of the demised property, the revision petitioner has come forward with an application for the reliefs referred to above. From the facts narrated supra it is clear that the revision petitioner is claiming right to the demised property through Tamils lvam who was the auction purchaser in the execution proceedings initiated for recovery of amount due on promissory note in simple money decree. The fifth respondent claims right and title over the demised property by purchasing the same in the execution proceedings initiated for recovery of the amount due under mortgage by deposit of title deeds by the second respondent in favour of the first

respondent in this Civil Revision Petition. 10. In M.N. NAGENDRAN CHETTIAR vs. - LAKSHMI AMMAL, A.I.R. 1933 Madras 583(F.B.), a Full Bench of this Court dealt with rival claims made for possession of property which was subject matter of two separate mortgages in favour of two different persons after sale of such property separately in each of two xecution proceedings initiated for sale of the same property to realise the amount due to the respective mortgagees. In that it was held as follows:- "I may here observe in passing that as between two rival purchasers, the title to the outstanding equity of redemption is determined by the priority, not of the respective mortgages, but of the respective sales." So it is clear from the decision of this Court, even if there was rival claim between two mortgagees claiming under two different mortgages, the title to the property has to be decided not on the date of execution of such mortgages, but on the priority o the sales of the property in such mortgages. It is also evident that the purchasers will be purchasing the title to the outstanding equity of redemption alone in the property purchased. It is relevant to point out that the revision petitioner who is s epping into the shoes of the auction purchaser in execution of a simple money decree due on promissory note cannot be equated with an auction purchaser pursuant to the decree obtained on mortgage by deposit of title deeds since the provisions of simple m rtgage are applicable to a mortgage by deposit of title deeds as per the decision of a Division Bench reported in MRS. ROSY GEORGE -vs.- STATE BANK OF INDIA AND OTHERS, A.I.R. 1993 KERALA 184(D.B.) wherein it was held as follows:- "By virtue of Sectio n 96 of Transfer of Property Act the provisions of simple mortgage are applicable to a mortgage by the deposit of title deeds." In IMPERIAL BANK OF INDIA -vs. - U RAI GYAW THU. AND CO. LTD., A.I.R. 1923 Privy Council 211 it was held that a mortgage by deposit of title deeds have been put on the same footing as a mortgage by deed by section 58 of the Transfer of Property Act. In ACHPAL MAHRAJ vs. - BHAGWANDAS DARUKA AND OTHERS 1950 SCR 548, the Honourable Apex Court consisting of three Honourable Judges have held as follows:- "A mortgage by deposit of title deeds is a form of mortgage recognised by section 58(f) of the Transfer of Property Act which provides that it may be effected in certain towns (including Calcutta) by a person "delivering to his creditor or his agent documents of title to immovable property with intent to create a secu rity thereon". That is to say, when the debtor deposits with the creditor the title deeds of his property with intent to create a security, the law implies a contract between the parties to create a mortgage, and no registered instr ument is required under section 59 as in other forms of mortgage." In this case the title deeds of the second respondent herein with regard to the demised property were deposited by him with the first respondent for the money already received by him as security for the repayment of the said amount. The memorandum filed subsequently in connection with the deposit of title deeds relating to the demised property by the second respondent to the first respondent for the money already received from the first respondent by the second respondent will not require registration i view of the decision of the Honourable Apex Court

referred to above. The principle laid down by the Honourable Apex Court in the case law cited above was followed and held that memorandum is not compulsorily registrable in the absence of any evidence t show that it was executed either simultaneously or prior to the deposit of title deed, in the decision of Kerala High Court reported in JOSEPH vs. - MICHAEL, A.I.R. 2000 KERALA 240. It is relevant to point out that it is not the case of the revision etitioner that any memorandum was given by the second respondent in favour of the first respondent simultaneously or prior to the deposit of title deed in this case. Therefore this Court holds that the mortgage by deposit of title deeds created by the s cond respondent herein in favour of the first respondent herein with regard to the demised property requires no registration. 11. In SAMARENDRA NATH SINHA -vs. - KRISHNA KUMAR NAG, A.I.R. 1967 SUPREME COURT 1440, the Transfer of Property Act does not strictly apply to involuntary alienations like, court sales, but principle of lis pendens applies to such alienations. The Honourable Apex Court in KEDARNATH LAL -vs. - Honourable Apex C ourt was pleased to hold that section 52 of the HEONARAIN, A.I.R. 1970 SUPREME COURT 1717 = (1970)2 S.C.R.204 was pleased to hold as follows:- "The proceedings in respect of the mortgage were pending from April 8, 1934 to July 20, 1937. The proceedings were for obtaining a mortgage award equ ivalent to a mortgage decree and not for a money decree. The fact that they were attached before judgment in D's suit does not affect the application of the doctrine of lis pendens. Attachment is only effective in preventing alienation and does no t create title to property. If, in fact the property was acquired pendente lite, the acquirer is bound by the decree ultimately obtained. Therefore, D's purchase on August 13, 1934, was hit by the doctrine of lis pendens section 52 of the Transfer of Property Act, 1882". 12. The Honourable Apex Court in JAYARAMA MUDALIAR -vs. - AYYASAMI, A.I.R.1973 SUPREME COURT 569 = (1973)1 SUPREME COURT 129 at 158 approved the decision in SAMARENDRA NATH SINGH vs. KRISHNA KUMAR A.I .R. (1967) 2 S.C.R. 18 = A.I.R.1967 SUPREME COURT 1440 = (1968)1 S.C.J. 68 wherein it was held as follows:- "The purchaser pendente lite under this doctrine is bound by the result of the litigation on the principle that since the result must bind the party to it so must it bind, the person deriving his right, title interest from or through him. This principle is well illustrated in RODHAMADHUJ HOLDER vs. - MANOHAR, 15 I.A.97, where the facts were almost similar to those in the i nstant case. It is true that section 52 strictly speaking does not apply to involuntary alienations such as court sales. But it is well established that the principle of lis pendens applies to such alienations." The above observations of the Honourable Apex Court were approved by the Honourable Apex Court in KEDARNATH LAL - vs. - SHEONARAIN, A.I.R. 1970 SUPREME COURT 1717 = (1970) 2 S.C.R. 204. The principles laid down in the decisions referred to above would learly show that the principle of lis pendens applies to Court auction sales also.
Following the ratio laid down by the Honourable Apex Court in the cases cited above, a learned single Judge of this Court(K.M. NATARAJAN, J.) in SAMBANDA MUDALIAR vs. - MUTHUSWAMI MUDALIAR

1989(1) M.L.J. 414 has held as follows relying on other decisions referred to here under:- "...on the earlier decision of the Privy Council reported in JADUNATH vs. - PARAMESWAR, A.I.R. 1914 PRIVY COUNCIL 11, where it w as held: "While the purchaser at an auction sale under a mere money decree gets no more than the right, title and interest of the judgment-debtor at the date of the sale, the purchaser under a mortgage decree gets the right, titl e and interest in the mortgaged subject which the mortgagor had at the date of mortgage and charged thereby. Buying the mortgaged property free from incumbrances he gets, as it is sometimes put, the title both of the mortgagee and of those interested in the equity of redemption..." In SUBBA RAO vs. - VENKATASESHACHARLU, (1948)1 M.L.J. 128 : 61 L.W. 435 : A.I.R. 1949 MADRAS,207 it was held:- "Where a property was sold and was purchased by A in execution o f his decree during the pendency on a mortgage suit in respect of that property and A obtained possession thereof and the mortgagee in execution of the decree made in his favour in that suit purchased the property himself: Held, that A, having purchased the property pendente lite, must be treated as a representative in interest of the judgment debtor and, therefore, a petition by the mortgagee decree holder for possession of the property purch ased by him was maintainable against A" The said decision also is applicable on all force to the facts of this case. In view of the ratio in the decisions cited above, I am of the view that the money decree-holder being the representativ e in interest of the judgment debtor is bound by the mortgage decree and that he had purchased only the right of redemption of the mortgage debt."

Therefore in this case the mortgage by deposit of title deeds with regard to the demised property was created by the second respondent in favour of the first respondent admittedly even on 17.8.1984 and a preliminary decree was obtained even on 27.4.1993 in O.S.No.203 of 1988 on the file of the Sub Court, Srivilliputhur based on the mortgage by deposit of title deeds. A final decree was also passed subsequently on 29.1.1996. It is after passing of preliminary decree on 27.4.1993 the property was brough to sale in E.P.No.15 of 1989 in O.S.No.72 of 1986 on the file of the Sub Court, Srivilliputhur in execution of simple money decree on promissory note and the property was sold on 4.2.1994 in Court auction in favour of Tamilselvam from whom the revision etitioner had purchased thereafter under Ex. P-3 dated 21.11.1994. If the ratio of the decisions referred to above are applied, this Court is of opinion that the revision petitioner who claims his right through the money decree holder is only a represen ative in interest of the judgment debtor and therefore he is bound by the mortgage decree and that he had purchased only the right of redemption of the mortgage debt. The title to the outstanding equity of redemption between two rival purchasers, viz., ne under simple money decree and another under mortgage by deposit of title deed cannot be determined by the priority in the date of sales as in the case between two rival claimants of two different mortgages in their favour on the priority of the respec ive sales and not on respective mortgages. 13. The learned counsel for the revision petitioner has

brought to the notice of this Court, the decision reported in A.M.E.P. MOHAMMED ISMAIL AND OTHERS vs. - S.A.S. ALAGAPPA CHETTIAR 1977(1) M .L.J. 76 wherein it was held as follows:- "...if by process of law or by a compelling situation sanctioned by law, the security given to a creditor metamorphoses itself and changes into something other than the property which constituted the origi nal security, then a mortgagee or a charge- holder over the quandom property is not helpless but he could trace his right to such metamorphosed security under the doctrine of substituted security enunciated in section 73 of the Transfer of Pro perty Act." Relying on this decision a learned single Judge of this Court in EASWARAN vs. - T.K. VENKATACHALAM AND OTHERS 1999(3) M.L.J. 168 has held that there was no patent error of law or perversity in the approach of the lower Court in orderi ng restitution of possession of property purchased by the money decree auction purchaser, since the purchase of the auction purchaser in execution of a mortgage decree was seven years after delivery of possession to the money decree auction purchaser. 14. A perusal of the judgment of the learned single Judge reported in l977(1) M.L.J. 76 cited supra would disclose that it was not brought to the notice of the learned single Judge of this Court while the decision was rendered in the c ase cited above about the various decisions of the Honourable Apex Court and the Privy Council referred to above and therefore there was no occasion for the learned single Judge to consider the decisions referred to above. It is based on such decision, another learned single Judge of this Court has followed the said ruling in 1999(3) M.L.J. 168. The principles laid down by the learned single Judges separately in the decisions referred to above are contra to the decision of the Honourable Apex Court s well as the Privy Council. This Court prefers to follow the decision of the Privy Council, Honourable Apex Court and also the decision reported in 1989(1) M.L.J. 414. In view of the said decision, this Court holds that the decisions relied on by the earned counsel for the revision petitioner cannot come to the rescue of the revision petitioner in any respect. In the said circumstances, this Court finds no error in coming to the conclusion by the Court below that the revision petitioner as petitione before the execution Court is not entitled to the reliefs sought for in the petition filed by him. 15. In fine, this Civil Revision Petition is dismissed, but in the circumstances of the case without costs. Consequently, connected C.M. P.No.20986 of 2001 is closed.

Index : Yes. 1-2-2002
ts.
To
The Subordinate Judge,Srivilliputhur P. THANGAVEL, J.
ts. Pre-delivery Order in C.R.P.No.3892 of 2001 and C.M.P.No.20986 of 2001 Date : -2-2002.
P□